

BAHARUDDIN ABBAS**a****v.****YAACOB SULAIMAN & ANOR**

HIGH COURT MALAYA, KUALA LUMPUR

b

CHIN FOOK YEN J

[ORIGINATING SUMMONS NO: 24-739-97]

6 JANUARY 1999

CONTRACT: *Agreement - Agreement to develop plaintiff's land for sale - Whether terminated - Whether null and void - Whether grounds for removing defendants' caveats*

c

The plaintiff, a registered proprietor of a piece of land ('the land') entered into a joint venture agreement ('the agreement') with the defendants to develop the land for sale. The defendant terminated the agreement on the ground that the defendants breached the agreement. When the defendants refused to remove the caveats lodged against the land, the plaintiff filed the instant action.

d

The plaintiff claimed (1) that there was no consideration by the defendants (2) that the agreement was void for uncertainty, and (3) that the agreement was terminated.

e**Held:**

[1] The agreement was a partnership agreement as opposed to an outright sale and purchase agreement. The plaintiff contributed his land as part of the consideration and the developers were to contribute expertise and working cost as consideration in return. This was a case of executory consideration and the plaintiff's averment of want of consideration must fail.

f

[2] Looking at the agreement in its entirety, there were many important matters left uncertain. In the circumstances, there was no concluded contract. An incomplete agreement cannot be enforced.

g

[3] The defendants did not do anything to develop the land. There was no doubt that the defendants had no money to invest in the project.

[Judgment for the plaintiff; caveats of defendants be removed forthwith.]

Case(s) referred to:

Wisma Sime Darby Sdn Bhd v. Wilson Parking (Malaysia) Sdn Bhd [1996] 4 CLJ 194 (*refd*)

h

For the plaintiff - Harjinder Singh (Sukdev Singh with him); M/s Ali Kamaruddin & Assoc

For the defendant - Serene Tan; M/s Shahlan & Assoc

i

Reported by Usha Thiagarajah

*a***JUDGMENT****Chin Fook Yen J:**

b This Originating Summons was converted into and heard as a writ action. After a full trial in which only the plaintiff and defendant 1 testified I gave judgment for the plaintiff. The defendants being dissatisfied therewith now appealed. The material facts may be summarised as follows.

c By an agreement in writing dated 14 September 1995 (P1) and a supplementary agreement dated 2 August 1996 (P2) (collectively called the joint-venture agreements) entered into between plaintiff as registered owner of a piece of land about 6 acre in area in Malay Reservation in Mukim Setapak, Gombak, Selangor (the Land) of the one part and the defendants of the other part, the plaintiff had allowed the defendants to develop the Land for sale upon the terms and conditions contained therein. More particularly, the main terms and conditions of the joint-venture agreements, so far as material to this action, were these:

d

(i) P1, cl. 3 stipulated that:

sebagai balasan kepada Tuan Tanah kerana bersetuju dengan Projek Tersebut, Yaacob dan Sharil bersetuju memberi kepada Tuan Tanah:

e

(i) Ringgit Tiga Ratus Ribu (RM300,000.00) sahaja daripada hasil jualan lot-lot tersebut; dan

(ii) tiga (3) lot yang bernombor 14, 37 dan 38 di dalam pelan di Lampiran 1 di sini, tiap-tiap satu mempunyai keluasan tidak kurang daripada enam ribu (6,000) kaki persegi, yang telah dipecahkan.

f

(ii) P1, cl. 4 stipulated that:

Wang berjumlah Ringgit Tiga Ratus Ribu (RM300,000.00) sahaja akan dibayar kepada Tuan Tanah daripada hasil jualan lot-lot tersebut dengan cara memberikan dua puluh (20%) peratus daripada hasil jualan lot-lot tersebut kepada Tuan Tanah setiap kali lot-lot tersebut dijual dan setiap kali pembayaran-pembayaran dibuat oleh pembeli-pembeli sehinggalah Tuan Tanah menerima kesemua wang berjumlah Ringgit Tiga Ratus Ribu (RM300,000.00) sahaja.

g

(iii) P1, cl. 11 stipulated that:

h

Hasil jualan lot-lot tersebut, setelah ditolak Ringgit Tiga Ratus Ribu (RM300,000.00) sahaja yang diberi kepada Tuan Tanah dan semua kos-kos menjalankan Projek Tersebut, hendaklah dibahagi seperti berikut:-

(a) Yaacob - tiga puluh lima (35%) peratus;

(b) Shahril - tiga puluh lima (35%) peratus;

(c) Tuan Tanah - lima (5%) peratus;

i

(d) Tabung Koperat - dua puluh lima (25%) peratus

(iv) P1, cl. 13 stipulated that:

Wang di dalam Tabung Koperat hendaklah dibahagi sama rata antara Yaacob, Shahril dan Tuan Tanah.

(v) P1, cl. 15 stipulated that:

Satu akaun berkaitan dengan Projek Tersebut hendaklah dibuka disebuah bank di Malaysia dan wang keluar masuk dan semua urusan berkaitan dengan akaun tersebut akan ditadbir oleh Yaacob dan atau Shahril.

(vi) under cl. 19 of P1 and under cl. 6.1 of P2, it was stipulated that time was of the essence of the agreements.

The so-called development involved only, upon conversion of the category of use from agriculture to building, subdivisions of the Land into 38 vacant lots, without putting up any building thereon, for sale, subject to the following deduction. Besides the terms and conditions aforesaid, one lot was to be given to each of the defendants being their part of the bargain for the task to be undertaken by them; one lot to be given to one HM Hazle bin Piee and 3 lots to be given away for public utilities, including sub-station for electricity. That would mean, by simple subtraction, only 29 lots were available for sale.

It was common ground that the application for conversion of the category of use of the Land was approved by the authority in a letter dated 11 January 1997 and within six months from date of the letter, *inter alia*, the following sums of money were required to be paid:

(i) RM41,779 being premium and

(ii) RM18,417 being drainage fee.

However, plaintiff, by a letter dated 8 January 1997, before the approval letter dated 11 January 1997, terminated the joint-venture agreements on the grounds that the defendants had breached the terms and conditions of the agreements in failing to carry out the obligations contained therein. Proceedings were commenced only on 27 November 1997 apparently after defendants' refusal to remove their separate caveats lodged against the land. In his claim, plaintiff averred:

(i) that there was no consideration by the defendants;

(ii) that the agreements were void for uncertainty and /or

(iii) that the agreements had been terminated on 10 January 1997.

In the meantime, before the expiry date, application for extenuation of time was made. By a letter dated 6 September 1997 the plaintiff was informed that extenuation of time to pay the conversion fees was allowed and extended for another six months until 11 January 1998.

- a** The nature of the joint-venture agreements here was of a kind of partnership agreement as opposed to an outright sale and purchase agreement. Plaintiff had contributed his Land as his part of the consideration and the defendants as developers were to contribute expertise and working cost as consideration in return. Among others, under cl. 11 of P1, it was stipulated that both the
- b** defendants would advance 35% each of the working cost of the project. These agreements must be seen to be a case of executory consideration. In the circumstances, the first ground of the plaintiffs averment of want of consideration must fail.

- c** The next contention of the plaintiff that the agreements were void for uncertainty had to be considered in depth. To begin with, it was not disputed that there was no time stipulated for the completion of the project, barring the time needed by the local authority to approve conversion and/or subdivision of the Land. As it was, it would appear to be uncertain. The plaintiff in his testimony in court stated that the project had to be completed in one year and in
- d** this respect defendant 1 stated in evidence that time was not mentioned in the agreements at all. In this connection it would be interesting to note that although the plaintiff was to receive a cash payment of RM300,000, this amount could only be realised from instalments payments of 20% from each sale of the lots. My next question was what would be the sale price of each lot for without
- e** which 20% of the proceeds of sale of the 29 lots might not fetch RM300,000 to pay the plaintiff. What would happen if some of the lots were not saleable at all? How long would the plaintiff have to wait to receive his money? Looking at the agreements in their entirety, the court felt that there were so many important matters left uncertain. In the circumstances, I had to agree
- f** that there was no concluded contract. An incomplete agreement cannot be enforced (see *Wisma Sime Darby Sdn Bhd v. Wilson Parking (Malaysia) Sdn Bhd* [1996] 4 CLJ 194; [1996] 2 AMR 1315 CA). On this score alone the plaintiff would succeed in his claim.

- g** Even if I were wrong in my view of an incomplete agreement, I would still find judgment for the plaintiff for the following reasons. As stated earlier in my judgment this was a case of executory consideration. What then were the considerations of the plaintiff for his contribution of his Land to the joint-venture project? In a case of this nature, one of development the plaintiff needed the expertise of the defendants or their agents in the execution of the project. More so, he had to rely on the defendants for fund as working capital
- h** to meet with the expenses in the employment of professionals for their services to do the survey, the layout plans, etc. Since the inception of P1, on 14 September 1995 until 8 January 1997 when plaintiff terminated the agreements, a period of about 1 year and 3 months, on the facts of the case as adduced in evidence both the defendants had not done anything to develop
- i** the Land. The application for conversion had to be done by the plaintiff being the registered owner of the Land; as there was no evidence to show otherwise.

No survey of the Land had commenced; no layout plan had been drawn up; no infra-structure works had commenced and no evidence to show any levelling and filling of the Land had been done accordingly. Practically the Land was intact. Neither did they show that any such professionals had been engaged for the services, as would have expected of a *bona fide* developer. This was indeed a simple development involving only subdivisions, without having to incur any high cost or capital as would be expected in the case of putting up complex or multi-storey buildings. Plaintiff had described the status of the defendants very accurately when he said in evidence the reason being “Sebab tak ada duit”. I accepted that that was the main reason why the defendants were unable to perform their part of the obligation. The defendants were betrayed by the fact that they had no capital at all to invest in the project, when they failed to meet with the initial payment of the premium and the drainage fees. They tried in vain to explain their way out for failing to pay the dues. Firstly, defendant 1 stated in evidence that they did not receive the letter of termination of 8 January 1997. They only knew of the termination letter sometime about 31 July 1997. Therefore, they should have paid the dues, if they were able to do so financially, on or before 11 July 1997 when payments were due to expire. In his affidavit dated 12 January 1998 filed in opposition to the Original Summons defendant 1 stated that “plaintiff sepatutnya membayar premium kerana surat tersebut (approval letter for conversion) telah dialamatkan kepada plaintiff”. This was a flimsy excuse, to say the least. I would have expected defendant 1 to frankly admit to pay 70% of it shared between the defendants as stipulated under cl. 11(a) & (b) of P1. When he was questioned about the financial position of Tabung Koperat under cl. 13 of P1, he replied that “Tabung Koperat di adakan apabila tanah dijual”. Again, when he was enquired whether any bank account had been opened under cl. 15 of P1, he again replied that “Akaun dibuka hanya tanah dijual”. From his own testimony, it would appear that every item of expenditure, even the deposit for opening bank account would have to wait until after the sale of the lots. I had no doubt that the defendants had no money to invest in the project. Secondly, they averred that they were advised against payment, because of the existence of a third party caveat against the Land. The defendants had not produced any such evidence, apart from defendant 1’s bare allegation.

In view of the breach on the part of the defendants to perform their obligations under the joint-venture agreements, the contract was, to my mind, deemed to be terminated. On these facts and findings, I was of the view that the plaintiff had proved his case. On this score, the contract was terminated. I also declared the contract null and void for uncertainty. Judgment for plaintiff with costs. The caveats of the defendants be removed forthwith.

*a**b**c**d**e**f**g**h**i*